

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ADOLFO GUTIERREZ AVILA, JR.,

Case No. 19-CV-3112 (PJS/ECW)

Petitioner,

v.

ORDER

VICKY JANSSEN, MCF-RC Warden,

Respondent.

Petitioner Adolfo Gutierrez Avila, Jr., was convicted in state court of two counts of criminal sexual conduct and was sentenced to 144 months in prison on each count, to be served consecutively. Avila filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. The Court adopted the Report and Recommendation of Magistrate Judge Elizabeth Cowan Wright and dismissed his petition with prejudice. *See* ECF No. 32. Since then, Avila has filed three motions for relief from judgment under Fed. R. Civ. P. 60, all of which the Court has denied. ECF Nos. 35, 39, 50, 53, 57, 61. Avila also appealed to the United States Court of Appeals for the Eighth Circuit, which denied his motion for a certificate of appealability and dismissed his appeal. ECF No. 55. Avila recently petitioned for certiorari. ECF No. 65.

This matter is before the Court on Avila's fourth Rule 60 motion for relief from judgment. In this latest motion, Avila raises the same claim of prosecutorial misconduct—specifically, the failure to produce a Lyon County Sheriff's Office

report—that the Court has already held is procedurally defaulted. *See* ECF No. 27 at 6, 11–16; ECF No. 32. Avila also argues that the failure to produce this report is a federal crime and seeks an order requiring the release of the report.

As the Court has already explained to Avila, to the extent he is rehashing his arguments on the merits, his arguments are irrelevant, as the Court dismissed all of his federal claims as procedurally barred. And to the extent that his arguments can be understood as new theories for relief, they are “second or successive” claims under 28 U.S.C. § 2244(b) that cannot be entertained by this Court unless Avila first obtains permission from the United States Court of Appeals for the Eighth Circuit. *See Gonzalez v. Crosby*, 545 U.S. 524, 530–31 (2005).

Avila’s motion is therefore denied. In light of the fact that Avila has filed four frivolous motions since late February (and his filings seem to be increasing in frequency), the Court warns Avila that, if he files another frivolous motion in this case, the Court may impose a filing restriction.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Petitioner’s motion for relief from judgment under Fed. R. Civ. P. 60 [ECF No. 62] is DENIED.

2. To the extent a certificate of appealability is necessary, no certificate will issue.

Dated: August 11, 2021

s/Patrick J. Schiltz

Patrick J. Schiltz

United States District Judge